

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA	.	Criminal No. 1:10cr485
	.	
vs.	.	Alexandria, Virginia
	.	January 23, 2015
JEFFREY ALEXANDER STERLING,	.	1:28 p.m.
	.	
Defendant.	.	<u>EXCERPT OF P.M. SESSION</u>
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. . . . .	.	

TRANSCRIPT OF JURY TRIAL  
BEFORE THE HONORABLE LEONIE M. BRINKEMA  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:	JAMES L. TRUMP, AUSA DENNIS M. FITZPATRICK, AUSA United States Attorney's Office 2100 Jamieson Avenue Alexandria, VA 22314 and ERIC G. OLSHAN, Deputy Chief Public Integrity Section of the Criminal Division United States Department of Justice 1400 New York Avenue, N.W. Suite 12100 Washington, D.C. 20005
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FOR THE DEFENDANT:	EDWARD B. MAC MAHON, JR., ESQ. Law Office of Edward B. MacMahon, Jr. 107 East Washington Street P.O. Box 25 Middleburg, VA 20118 and BARRY J. POLLACK, ESQ. MIA P. HAESSLY, ESQ. Miller & Chevalier Chartered 655 - 15th Street, N.W. Suite 900 Washington, D.C. 20005-5701
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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

1 APPEARANCES: (Cont'd.)

2 CLASSIFIED INFORMATION  
3 SECURITY OFFICERS:

CHRISTINE E. GUNNING  
MAURA PETERSON

4 ALSO PRESENT:

GERARD FRANCISCO  
SA ASHLEY HUNT  
JENNIFER MULLIN, ESQ.

6  
7 OFFICIAL COURT REPORTER:

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1                   A F T E R N O O N   S E S S I O N

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3                   (Recess from 1:53 p.m., until 3:42 p.m.)

4                   (Defendant present, Jury out.)

5                   THE COURT: All right, as long as I have one counsel  
6 per side, that's all that we need, so, Mr. Olshan, you're on  
7 the board.

8                   Okay. The first question they have is, "May we have  
9 another copy of the jury instructions. We only have three  
10 copies."

11                   We've made them two more full sets, with the two  
12 supplementals that we added, okay? So I assume there's no  
13 objection to that?

14                   MR. OLSHAN: No.

15                   MR. MAC MAHON: No, Your Honor.

16                   THE COURT: All right, that's fine.

17                   And the second note from the jury: "If there is no  
18 government delay or closing on Monday, we will be starting at  
19 10 a.m.," all right?

20                   So Monday morning is ten unless there's a government  
21 problem, all right? And we'll face that when we come to it.

22                   All right, now, the substantive question: "Count 3  
23 states that the document was in his residence. The elements do  
24 not use the term 'residence.' Do the words in the count take  
25 precedence over the words in the elements?"

1           The answer is it's the words in the elements. Any  
2       dispute about that?

3           MR. OLSHAN: No, Your Honor. I think it would just  
4       be useful for the Court to remind them, as with the question  
5       about the other count, that the count instructions are  
6       summaries of the allegations, and what should control their  
7       decision making is the specific elements laid out in the  
8       respective offense element instructions.

9           THE COURT: So you want me to tell them the counts --  
10      the description of the counts are just a brief summary of the  
11      specific charge, and what they must use in determining whether  
12      or not the government has proven the charge beyond a reasonable  
13      doubt are the specific elements contained in these  
14      instructions.

15          MR. OLSHAN: Correct.

16          THE COURT: Is that comfortable -- does that sit well  
17      with you? I want to give it to them quickly so that I don't  
18      have to type it again.

19          MR. MAC MAHON: No, I'm sorry, Your Honor. I think  
20      this is a problem with these nature of the offense  
21      instructions, which describes the actual possession of the  
22      letter at his residence here in Virginia. It's going to get us  
23      back to the venue question as far as I can see.

24                 I think what they need to be told is -- I agree with  
25      what Mr. Olshan says is that the elements are not set forth in

1 these nature of the charge instructions, but that, but the  
2 element to be guilty of this count, what it said has to have  
3 unauthorized possession or control over a document relating to  
4 the national defense of the United States.

5 It did say in the indictment that it was in his  
6 residence in the Eastern District of Virginia, and that if  
7 that's what they're asking is does it have to use the term  
8 "residence," they still need to find that it was in his, in his  
9 possession in the Eastern District of Virginia between January  
10 31, '02, and '03.

11 So I don't know if they're confused about the term  
12 "residence" or about anything else, but that is part of the  
13 offense that has to be charged. So I think just telling them  
14 that they should look at the elements is not the whole answer  
15 to their question, is what are they also meaning by in the  
16 relevance, because, of course, the relevance of the residence  
17 in the, in the nature of the charge instruction is because of  
18 the venue issue, he had to possess it here in the Eastern  
19 District of Virginia, and so that issue is right in front of  
20 them, and I think they should be told that they have to find  
21 that it was, you know, that letter was possessed in the Eastern  
22 District.

23 THE COURT: Mr. Olshan?

24 MR. OLSHAN: Your Honor, as I recall, there were two  
25 options before the jury was instructed. One was to just give

1     them a copy of the indictment versus summaries of each of the  
2     offenses. Obviously, if the Court had given the jury the  
3     actual indictment, it would have contained all the factual  
4     allegations in the indictment, not just what has been  
5     summarized for purposes of these summary of the offense  
6     instructions. So this issue would have come up either way, but  
7     what controls the jury's decision is what the actual elements  
8     of the offenses are, not all of the specific factual  
9     allegations.

10                 So I agree with Mr. MacMahon that they must conclude  
11     that there was unlawful retention of this document in the  
12     Eastern District of Virginia, but I believe by pointing them  
13     back to the elements, that's sufficient.

14                 MR. MAC MAHON: And I'll just rest, Your Honor. The  
15     elements --

16                 THE COURT: Wait, wait, wait, wait, wait. I'm  
17     writing. Hold on one second.

18                 MR. MAC MAHON: Thank you.

19                 THE COURT: All right, how about this: It is not an  
20     element of Count 3 that the document was in defendant's  
21     residence. To find the defendant guilty of Count 3, you must  
22     be satisfied beyond a reasonable doubt that the government has  
23     proven the two elements described on page 41 and proven venue  
24     in the Eastern District of Virginia by a preponderance of the  
25     evidence. See Instruction 56.

1 Is the government satisfied with that?

2 MR. OLSHAN: Yes, Your Honor.

3 THE COURT: Mr. MacMahon?

4 MR. MAC MAHON: Your Honor, my only suggestion would  
5 be as to the document, it is the letter itself, if the Court  
6 wants to clarify that.

7 THE COURT: Should I say "the letter"? Does  
8 everybody agree that's what they're talking about? They use  
9 the word "document." Count 3 states that the document was in  
10 his residence, and that refers to the letter.

11 MR. OLSHAN: That's fine, Your Honor.

12 THE COURT: All right. So, all right, I'm going to  
13 really go over this one more time: It is not an element of  
14 Count 3 that the letter -- shall I say "the letter at issue" so  
15 there's no question about it?

16 MR. MAC MAHON: That's fine.

17 THE COURT: The letter at issue was in defendant's  
18 residence. To find the defendant guilty of Count 3, you must  
19 be satisfied beyond a reasonable doubt that the government has  
20 proven the two elements described on page 41 and proven venue  
21 in the Eastern District of Virginia by a preponderance of the  
22 evidence as explained in the instruction on page 56.

23 All right? We're going to type that up and get it to  
24 the jury. Yes?

25 MR. OLSHAN: That's fine.

1 THE COURT: Any objection from defense?

2 MR. MAC MAHON: Your Honor, I know you haven't given  
3 us this before, but I'll just say it for the record: I think  
4 that the venue can only be by retaining the document itself in  
5 the Eastern District on this count and that when you say  
6 "venue," I think that the issue of retention again is coming to  
7 the fore. There's no proper venue to be found in the Eastern  
8 District unless they find that that document was retained here,  
9 but that may be beyond the scope of the question.

10 In fact, the instruction says it was willfully  
11 retained, the same document. As Mr. Pollack points out, it's  
12 on page 41, Your Honor.

13 THE COURT: But the offense -- would not the offense  
14 also occur in any district where it was failed to be delivered?  
15 In other words, if I retained a document in Maryland which  
16 should have been returned to the CIA in Virginia, is the, is  
17 the offense, is the offense --

18 MR. MAC MAHON: Judge, I don't think so. I don't  
19 think there's any evidence of a request whatsoever in this  
20 case.

21 THE COURT: All right.

22 MR. MAC MAHON: The one, the one time that the, we  
23 heard testimony of anyone talking about documents was in New  
24 York, when he was read out anyway.

25 THE COURT: Well, no, you also have the debrief.



1 MR. MAC MAHON: That was in New York, Your Honor.

2 THE COURT: The debriefing was in New York?

3 MR. OLSHAN: The debriefing was at the CIA, and the  
4 date that's alleged in Count 3 is the date that he left that  
5 agency, which is January 31, 2002. Ms. Scherlis asked him if  
6 he had any additional -- any classified documents, and he said  
7 no.

8 THE COURT: But where did that occur?

9 MR. OLSHAN: In Langley.

10 THE COURT: In headquarters. That's what I thought.

11 MR. OLSHAN: He had returned to headquarters after he  
12 left New York in August 2000.

13 MR. MAC MAHON: He'd still have to retain the  
14 document. They still have to find that he retained the  
15 document. If he hadn't retained it, he couldn't have failed to  
16 deliver it even if the jury construed her request as applying  
17 to --

18 THE COURT: All right. It is not an element of Count  
19 3 that the letter at issue was in defendant's residence. The  
20 issue is did he willfully retain the document in the Eastern  
21 District of Virginia.

22 MR. MAC MAHON: That's fine, Your Honor.

23 THE COURT: Right?

24 MR. OLSHAN: One moment, Your Honor.

25 THE COURT: Yeah, I'm going back to square one on

1 this one.

2 All right, here's what I'm going to give them: It is  
3 not an element of Count 3 that the defendant willfully retained  
4 the letter in his residence. To find the defendant guilty of  
5 Count 3, you must be satisfied that the government has proven  
6 the two elements explained on page 41 beyond a reasonable doubt  
7 and that the willful retention occurred in the Eastern District  
8 of Virginia by a preponderance of the evidence.

9 MR. OLSHAN: That's fine, Your Honor.

10 THE COURT: All right? Last call to the defense, any  
11 objection?

12 MR. MAC MAHON: Yes, Your Honor, that's fine.

13 THE COURT: All right.

14 MR. MAC MAHON: There are, there are actually two --  
15 that's fine, Your Honor.

16 THE COURT: All right, that's what we're going to  
17 type up. Again, you'll have it before we give it to the jury.  
18 We'll recess court.

19 (Recess from 3:58 p.m., until 4:07 p.m.)

20 (Defendant and Jury present.)

21 THE COURT: All right, ladies and gentlemen, I'm  
22 going to give you another supplemental instruction. I'll just  
23 read it to you now, and it will be 41(a) if you're putting it  
24 in your packets.

25 It is not -- I'm sorry, the question that you asked

1 was, "Count 3 states that the document was in his residence.  
2 The elements do not use the term 'residence.' Do the words in  
3 the count take precedence over the words in the elements?"

4 Well, the words in the elements always take  
5 precedence, but let me go over this more specifically with you:  
6 It is not an element of Count 3 that the defendant willfully  
7 retained the letter at issue in his residence. To find the  
8 defendant guilty of Count 3, you must be satisfied that the  
9 government has proven the two elements explained on page 41 of  
10 the instructions beyond a reasonable doubt and that the willful  
11 retention occurred in the Eastern District of Virginia by a  
12 preponderance of the evidence.

13 Because that's the venue issue that I explained to  
14 you, and I think that may be Instruction 56.

15 All right, I hope that explains it. You've now got  
16 five sets of instructions, right? So we'll give you five of  
17 these packages so you can keep your packets together.

18 Any objection from counsel?

19 MR. OLSHAN: No, Your Honor.

20 MR. MAC MAHON: No, Your Honor. Thank you.

21 THE COURT: All right, thank you, ladies and  
22 gentlemen. We'll send you back to continue your deliberations.

23 (Recess from 4:07 p.m., until 4:29 p.m.)

24 (Defendant and Jury present.)

25 THE COURT: Well, it's 4:30, and you-all told us you

1 wanted to stop, so I again want to just send you off for the  
2 weekend and again hope that you have a restful weekend. Please  
3 remember, no work on the case whatsoever. No communications  
4 with anybody.

5 I know one of you became a carpooler with one of the  
6 alternate jurors. Make sure you don't have any contact with  
7 her.

8 And again, just continue doing what you're doing, and  
9 we'll see you hopefully at 10:00 Monday morning so there are no  
10 weather issues, all right?

11 Again, we're going to leave the evidence in the room  
12 other than the three exhibits that have to be specially locked  
13 up. Otherwise, everything will stay as you've left it, all  
14 right? If there's nothing further, we'll recess.

15 And then, counsel, you don't need to be back here  
16 until 10:00 Monday.

17 Oh, I did want to warn you there is one thing. I'm  
18 starting another jury trial Monday morning. I'm going to use a  
19 different jury room for that jury, but because I am going to  
20 have some matters going on in here, there may be a little bit  
21 more of a delay in getting back to you-all with questions. And  
22 that trial is going to start at 10:00 in this courtroom.

23 So, counsel, you should know that, too, all right?  
24 We'll recess court for the day. Thank you.

25 (Recess from 4:31 p.m., until 10:00 a.m., January 26, 2015.)

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CERTIFICATE OF THE REPORTER

I certify that the foregoing is a correct excerpt of the  
record of proceedings in the above-entitled matter.

/s/  
Anneliese J. Thomson